

Effective Pandemic Management Requires the Rule of Law and Good Governance

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As countries through Europe enter into a second lockdown, essential questions must be asked of what collective lessons on policy and legal measures have been learned from the last ten months of pandemic. An emergency necessitates an emergency response by governments. However, emergencies should be temporary – the inherent dangers of permanent emergency, or the normalisation of emergency, are manifold. Nine months since the [declaration](#) of the novel SARS-CoV-2 virus as a global health emergency by the WHO, and we know much more about the virus, including transmission and control. Governments, however, are still operating in emergency mode and relying on emergency powers to the exclusion and suspension of the ordinary functioning of the state. Such suspension of the normal functioning of parliamentary control and judicial oversight, often coupled with repressive ‘[crackdowns](#)’ on populations to control the virus, exposes one of the most damaging fallacies of crisis: that emergency management requires the suspension of rights, the rule of law and good governance.

Rather than recognising the importance of adhering to good practices that facilitate public trust and so public compliance, many governments have resorted to *bad* governance practices. With unjustified and targeted restrictions and use of powers that have a negative effect on the rule of law and rights, they risk the opposite of the intended effect of moderating the threat of COVID-19. A compounding concern is that many governments appear reluctant to let go of new powers, echoing the negative historical precedent of a permanent [shift of power](#) towards the executive following an emergency. Such permanent changes in the balance of power present profound and long-term impact on the rule of law and rights, and our research shows this does not correlate with a better response to COVID-19. States must instead adopt long-term strategies to combat the virus, but also to restore ordinary democratic processes and the rule of law.

In this post, we argue that the most effective action in response to global health emergency is guided by principles of the rule of law and good governance. Based on analysis of the “[COVID-19 and States of Emergency](#)’ symposium, we published a [policy paper](#) that advocates eight principles of rule of law and good governance to guide action during a public health emergency. While it may likely be impossible even within the next decade to determine the scale and cost of COVID-19, and so the best practices in response to it, it is nevertheless possible to identify emerging *good* practices which have correlated with more positive outcomes including higher levels of public compliance, lower infection rates, and lower mortality rates. As governments and legislatures look to adapt, reform, and (re)build resilience within their systems: these principles should guide them.

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(1) Ensure Legal Certainty and Clarity in Public Communication

Beyond those particularly vulnerable to the effects of the disease, the undetermined health, economic, and social impacts of the pandemic create a situation of deep uncertainty. People rely on information provided by governments and central authorities to mitigate against 'fake news' and unreliable opinion. Clarity in both the rules and the justifications underlying them, helps citizens understand what the rules and regulations designed to control the spread of the pandemic are, and why they are in place. To achieve this, legal rules and restrictions must be certain in their [meaning, consistent and prospective in their application](#). Changes should be announced in advance with sufficient notice to prepare. An issue criticised by the [WHO](#) as undermining public trust is where government messaging is [incoherent](#) or inconsistent with [frequently changing rules](#).

Public messaging should be clear, accessible and consistent; early and regular updates on developments, policies and actions should be provided to avoid misinformation and speculation and governments should aim to implement and disseminate a staged and sequenced response plan. The positive actions of [New Zealand](#) and [Australia](#) exemplify this approach.

(2) Ensure transparency in decision-making processes

High levels of transparency in [decision-making](#) as to who is making decisions, and on what basis is intrinsically linked with public trust in government action. Membership of key decision-making bodies, and the scientific evidence and rationale that underlies interventions should be made available. This is particularly important as COVID-19 represents a situation where the risks are large, and decisions are being made on the basis of evidence that is emerging and yet still preliminary and limited.

(3) Comply with international law and human rights standards

Adherence to international law and domestic human rights standards does not prevent countries from imposing restrictions on citizens to curb the spread of the virus. However, these restrictions must be subject to the principles of legality, necessity, proportionality, temporariness, effective oversight and prospectivity. Countries which work to secure rights are likely to have responses which are '[more effective and sustainable over time than arbitrary or repressive ones](#)'.

(4) Aim to deliver rapid, coordinated, and collective action

States which responded rapidly to the COVID-19 crisis have been able to exert more control to mitigate the negative consequences of the epidemic; taking into account that the costs of underreaction outweigh those of overreaction in a health emergency. A rapid, systematic, cross-governmental adoption of a strategic approach to tackle the crisis is most beneficial to states and states should therefore coordinate action plans across national, regional, and local levels to ensure collective action which also facilitates adaptation to local conditions.

Prompt and decisive responses, particularly those expanding testing, tracing, social distancing and treatment, have shown to be successful such as in the cases of [South Korea](#) and [Japan](#). In contrast, the experiences of states which do not have a coordinated approach or a comprehensive plan of action at federal executive level suffer the consequences as in [Brazil](#) and the [USA](#).

(5) Ensure that emergency measures are only targeted at resolving the health crisis and not at achieving other policy goals

Non-pharmaceutical interventions should be limited to the purpose of responding to the crisis and should never be the means by which government policy unrelated to the emergency is introduced, for example the [criminalisation of abortion in Poland](#). Policies which differentially impact on different groups, particularly those in vulnerable categories should not be introduced without objective, and health-based justification. States should ensure COVID-19 interventions are tailored to respond only to the emergency, and that measures adopted are non-discriminatory and protect groups in vulnerable circumstances.

(6) Protect oversight mechanisms to ensure higher quality of law, policy, and compliance

Democratic oversight is guaranteed through political scrutiny, judicial review and public accountability through the media which cumulatively act as an important check on the use of power. This can improve the quality of the law and the effectiveness of measures. Governments should therefore ensure the legislature and courts continue their ordinary functions so far as is possible through reasonable adjustments, and ensure additional oversight of [emergency measures](#). Alongside this it is essential the processes exist to challenge the application of emergency measures, and that additional oversight mechanisms are targeted at the application of emergency measures. Positive examples of good practice are already in evidence: for example, the ex-ante checks before the *Conseil d'État* in [France](#).

(7) Engage with external (including scientific) expertise, and stakeholders and learn from international experience

While emergency necessitates urgent action, subsequent and ongoing review and reform is needed to ensure that states adapt to the latest information, developments, and challenges. Engaging with external expertise and examining international experience to adopt the most successful practices improves the quality of domestic law and policy. Specifically, states should follow guidance from multilateral institutions, in particular the WHO; and review and learn from international experience. States should invite input, including constructive feedback and criticism from a broad range of stakeholders including experts, civil society and nongovernmental organisations, to improve the quality of law and policy. [Finland](#) sets the standard of good practice for the review of constitutionality and rights-compliance of executive action through standing committees and engagement with external legal and constitutional experts.

(8) Reform the law following identification and analysis of best practices at domestic and international levels

As the immediate crisis passes, there will be an opportunity for states and international bodies to examine and review the impacts on their constitutional and legal architecture, as well as health and crisis response preparedness. To do so, states will need to review the legal provisions for the declaration of a 'state of emergency'. They should also look to review and reform provisions in health legislation which relate to pandemics; and to review the actions taken by all state actors during the pandemic for capacity, efficacy, and appropriateness of response.

Looking forward

The global challenges wrought by COVID-19 are unprecedented. The inherent unpredictability of viruses mean that the task of responding to epidemics will always be uncertain. Uncertainty, however, does not necessitate a permanent state of emergency. While there is no 'perfect' response to crisis, there is emerging evidence of good practice embodying the values of the rule of law and good governance. The principle we advocate, while not alone sufficient to ensure effective containment of Covid-19, will help facilitate effective management of the crisis.

This post is based on J Grogan and N Weinberg, 'Principles to Uphold the Rule of Law and Good Governance in a Public Health Emergency' RECONNECT Policy Brief (August 2020).

